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No. 84-1020

In the Supreme Court of the United States

OCTOBER TERM, 1984

HAROLD G. WHITE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the testimony of a witness was the direct result of an illegal wiretap.

2. Whether the district court should have dismissed the indictment because evidence derived from an illegal wiretap was presented to the grand jury.

3. Whether the prosecutor was required to notify petitioner of the illegal wiretap before his grand jury appearances.

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App A1-A4) and the district court (Pet. App. A7-A12) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 12, 1984. A petition for rehearing was denied on November 14, 1984 (Pet. App. A5). The petition for a writ of certiorari was filed on December 28, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted on one count of conspiring to distribute marijuana, in violation of 21 U.S.C. 846 and 841(a)(1), and two counts of perjury before a grand jury, in violation of 18 U.S.C. 1623. He was sentenced to consecutive terms of five years' imprisonment on the conspiracy count and on one of the

perjury counts, with imposition of sentence on the second perjury count suspended in favor of a five-year period of probation. The court of appeals affirmed (Pet. App. A1-A4).

1. The evidence revealed that petitioner, the former Sheriff of Marion County, Missouri, conspired with Rey Orta to distribute marijuana. Petitioner's role in the conspiracy was to impede any investigations directed against Orta. For his efforts, petitioner received regular payoffs from Orta, who was the principal government witness at petitioner's trial.

From April 2-15, 1983, Orta's telephone was tapped illegally by state and local police officers. The wiretap confirmed that Orta was selling marijuana, and it also resulted in the unanticipated interception of a call from petitioner to Orta. During that call, petitioner, who did not know about the wiretap, warned Orta that state and local law enforcement officers had him under surveillance. Pet. App. A2, A30.

At that point, one of the local officers involved in setting up the illegal wiretap informed Warren Wells, the prosecuting attorney for the county, of the existence of the wiretap and the intercepted call between petitioner and Orta. Wells, who did not know that the wiretap violated federal law, called petitioner that evening and told him that a search warrant for Orta's home would be issued the next day. No search was in fact planned, but Wells made the call to see if petitioner would pass the information on to Orta. The next day, petitioner did indeed call Orta and warn him that it was "mayday," and that a search warrant would be executed at his home. Pet. App. A7-A8, A18.

On April 12, 1983, Major Fisher of the Missouri Highway Patrol learned of the illegal wiretap and ordered it stopped immediately. He also advised the DEA and the FBI

of the illegal wiretap, Orta's drug dealings, and petitioner's conspiracy with Orta. The upshot of these consultations was a decision that the FBI would investigate the illegal wiretapping, taking possession of and sealing all of the illegally obtained tapes, and the DEA would begin an intensive investigation of Orta, independent of any information obtained from the wiretap. Pet. App. A2, A8.[1]

While the FBI was investigating the illegal wiretapping, the DEA had Orta's home under surveillance. DEA's supervisory agent knew of the prior illegal wiretap, but DEA Agent Timothy Brunholtz, who was in charge of the investigation of Orta, did not know of the wiretap or of petitioner's involvement with Orta. Pet. App. A2. On April 20, 1983, DEA agents observed Orta (who had just returned from Texas) coming and going from his residence and meeting various people for what appeared to be drug transactions. The DEA agents also saw Orta transfer two large bags from his car to a van in a city park. The DEA agents, believing that Orta had just transferred drugs, stopped the van, the car, and Orta. A search of the van revealed 20 pounds of marijuana in the bags. *Id.* at A2-A3.

Agent Brunholtz arrested Orta, read him his *Miranda* rights, and, in keeping with his usual practice, asked Orta if he would cooperate with the authorities. Orta said that he had useful information but that he would provide it only if he was not prosecuted. Later that evening, the United States Attorney decided not to prosecute Orta in exchange for information concerning Orta's drug suppliers and petitioner. Pet. App. A3.

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[1]As the district court noted, Orta was no stranger to the DEA even before the illegal wiretapping. The district court observed that the "DEA knew of Orta a year and a half prior to April, 1983. Investigation was begun as early as April, 1982" (Pet. App. A9).

2. Orta was the government's principal witness at petitioner's trial. Both the district court and the court of appeals rejected petitioner's contention that the indictment and Orta's testimony were a direct result of the illegal wiretap. Both courts found that Orta's decision to testify was the product of his own free will, resulting from his arrest as he was committing a crime. The courts further held that the DEA's investigation of Orta, and subsequent development of evidence against petitioner, derived from sources independent of the illegal wiretap. Accordingly, the courts refused to dismiss the indictment and held that Orta's testimony had been properly admitted. Pet. App. A4, A9-A12.

The court of appeals also summarily rejected petitioner's claims that the government had a duty to disclose the existence of the illegal wiretap prior to petitioner's grand jury appearances, that the government had disclosed information obtained from the wiretap to the grand jury, and that petitioner's perjured statements to the grand jury were not material and relevant to its investigation (Pet. App. A4).

ARGUMENT

1. Petitioner contends (Pet. 10-15) that Orta's testimony against petitioner was derived from the illegal wiretapping of Orta's telephone and therefore should have been suppressed. The courts below correctly rejected this contention.

A prior illegality — here, the tapping of Orta's telephone — does not call for invocation of the exclusionary rule when the evidence in question was acquired through a source independent of any violation of the defendant's rights or by means sufficiently distinguishable to be purged of the primary taint. See, *e.g., Segura* v. *United States,* No. 82-5298 (July 5, 1984), slip op. 8; *Brown* v. *Illinois,* 422 U.S. 590, 599 (1975); *Wong Sun* v. *United States,* 371 U.S. 471 (1963). Among the relevant factors in determining whether a witness's trial testimony was the direct result of improper

police action are the witness's willingness to testify, the significance of the illegality in securing the testimony, the proximity between the illegality and the witness's decision to cooperate with the authorities, and the police motivation in conducting the illegal search. *United States* v. *Ceccolini,* 435 U.S. 268, 276-279 (1978).

Applying these factors to the instant case, it is clear that Orta's testimony was properly admitted. In order to obtain suppression of that testimony, petitioner would have to demonstrate that it was produced by a violation of his rights, not merely Orta's. While it is true that two of petitioner's conversations were unlawfully intercepted, it is beyond serious dispute that Orta's eventual cooperation cannot be ascribed to that violation of petitioner's rights. First, Orta's identity as a suspected drug dealer was known to both state and federal authorities long before the illegal wiretap. See Pet. App. A9-A10; *Ceccolini,* 435 U.S. at 279. Second, Orta's decision to cooperate with the authorities resulted from his valid arrest on charges of distributing marijuana. During the arrest and the negotiations to secure his testimony, the authorities never mentioned the illegal wiretap. Indeed, the fact that Orta decided to cooperate only after he had received a promise of immunity establishes that he acted out of concern for his own self-interest, based on an assessment of his own situation. Finally, the illegal wiretap (of which Orta was completely unaware) was initiated to obtain evidence regarding Orta, not petitioner. The unanticipated interception of petitioner's first call to Orta played no part in the decision to tap Orta's telephone. Thus, Orta's testimony was completely independent of the illegal wiretap, and it was properly admitted. See *United States* v. *Schaefer,* 691 F.2d 639, 644-645 (3rd Cir. 1982); *United States* v. *Hooton,* 662 F.2d 628, 631-633 (9th Cir.

1981), cert. denied, 455 U.S. 1004 (1982); *United States* v. *Leonardi*, 623 F.2d 746, 751-754 (2d Cir.), cert. denied, 447 U.S. 928 (1980).[2]

2. Petitioner also contends (Pet. 15-16) that the district court should have dismissed the indictment on the ground that evidence derived from the illegal wiretap was presented to the grand jury in violation of 18 U.S.C. 2515.[3] Petitioner has offered no reason to review the court of appeals' conclusion (Pet. App. A4) that the government did not disclose any information obtained from the wiretap to the grand jury.

The intercepted conversations between petitioner and Orta were never given to the grand jury, but references to prosecutor Wells' fake search warrant plan (see page 2, *supra*) were. Donald Campbell, petitioner's deputy sheriff, was subpoened before the grand jury. He voluntarily brought with him a report prepared by petitioner that purported to be petitioner's investigation of Orta.[4] Included in

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[2]Orta's testimony also could have been admitted under the inevitable discovery doctrine. See *Nix* v. *Williams*, No. 82-1651 (June 11, 1984). As the district court stated after observing that the DEA knew of Orta long before the illegal wiretap (Pet. App. A9-A10):

> Not only is it likely that the government would have launched its own investigation and found Orta, even if no information had been received from the illegal wiretap, but it is clear that the government had actually been investigating Orta and in all likelihood would have continued the investigation since, as [petitioner] states, Rey Orta was known to all law enforcement agencies as a heavy drug runner.
>
> In this case, it was shown that the government already knew of Orta and was trying to catch him; therefore, he was already targeted as a source of possible information.

[3]Section 2515 provides that no evidence obtained through an illegal wiretap "may be received in evidence * * * before any * * * grand jury."

[4]Petitioner's defense at trial was that he was conducting his own investigation of drug dealing in his county and that his contacts with Orta were in furtherance of that investigation.

the report were references to the fake search warrant plan and petitioner's claim that he had alerted Orta about the plan because he thought prosecutor Wells was "testing" him and that Wells might be involved with Orta. Before the grand jury, petitioner and Orta were questioned about the information in the report, but without any reference to the wiretaps (GX 11, at 8-14; GX 17, at 28-29). It is thus clear that whatever information the grand jury heard about the fake search warrant plan was the result of Campbell's voluntary decision to produce petitioner's "report," and not the result, direct or indirect, of the use of illegally-obtained wiretap evidence.[5]

In any event, petitioner cites no authority for the proposition that dismissal of the indictment is a proper remedy for a violation of 18 U.S.C. 2515. This omission is not suprising because the statute provides otherwise; Section 2518(10)(a) states that suppression of the evidence is the statutory remedy for violations of Section 2515. Thus, petitioner had no right to dismissal of the indictment.

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[5]The indictment against petitioner listed three overt acts based on the fake search warrant plan. On petitioner's motion, the district court struck all references to the fake search warrant plan from the indictment and prohibited the prosecutor from introducing that evidence at trial (Pet. App. A13-A18). The district court's order was probably overly generous to petitioner because the evidence of the fake search warrant scheme was introduced to the grand jury through petitioner's own report. Since petitioner voluntarily prepared the report and gave it to his deputy, it was untainted by the illegal wiretap.

We note also that Section 2515's ban on the use of evidence derived from an unlawful wiretap would not, in any event, justify the exclusion of Orta's testimony before the grand jury. Section 2515 incorporates the attenuation analysis developed in Fourth Amendment jurisprudence. See S. Rep. 1097, 90th Cong., 2d Sess. 96 (1968). As we have demonstrated earlier, Orta's testimony was not a fruit of the illegal wiretap, and certainly not the fruit of the overhearing of two of petitioner's conversations during the course of the wiretap.

3. Finally, petitioner contends (Pet. 16-18) that the government was obligated to notify him of the illegal wiretap prior to his grand jury appearances. This contention is wholly without merit.

The applicable statute, 18 U.S.C. 3504, does not require the government to inform a grand jury witness of the existence of an illegal interception in the absence of a motion to that effect filed by the witness. See *United States* v. *Nabors*, 707 F.2d 1294, 1301-1302 (5th Cir. 1983), cert. denied, No. 83-552 (Feb. 21, 1984); *In re Baker*, 680 F.2d 721 (11th Cir. 1982). Petitioner never asserted that his conversations had been intercepted, and he therefore had no right to disclosure from the government of the illegal wiretap.[6]

Petitioner's argument (Pet. 17) that he was entitled to notice of the wiretap by virtue of the inventory provisions of 18 U.S.C. 2518(8)(d) is frivolous. That provision is part of a comprehensive set of procedures established for emergency and court-authorized wire and oral interceptions. It simply does not address the situation of the wholly unauthorized wiretap at issue in this case. Moreover, the suppression remedy of Section 2518(10)(a) does not apply to violations of Section 2518(8)(d). *United States* v. *Donovan*, 429 U.S. 413 (1977).

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[6]Nor could there be any basis in this case for a claim that petitioner was unable to file the proper motion because he was totally unaware of the wiretap. Petitioner, in his dealings with Orta, had told him that "they've got a listening device — they're on you all the time — three State boys." Petitioner further told Orta that "I'm going to tell you exactly what's happening — you're being watched and records are being made." GX 2. Whether or not these statements definitively show that petitioner knew of the wiretap, they at least demonstrate sufficient suspicion on his part to negate any possible excuse for not filing the motion required by 18 U.S.C. 3504.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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